No. 535

In the Supreme Court of the United States

OCTOBER TERM, 1946

THEODORE MARTIN SUNAL, PETITIONER

v.

DAVID R. LARGE, SUPERINTENDENT, FEDERAL PRISON CAMP, MILL POINT, WEST VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The district court wrote no opinion; its findings of fact and conclusions of law appear at R. 95–97. The opinion of the circuit court of appeals (R. 102–118) is reported at 157 F. 2d 165.

JURISDICTION

The judgment of the circuit court of appeals was entered July 29, 1946 (R. 118–119). The petition for a writ of certiorari was filed September 25, 1946, and was granted January 20, 1947 (R. 121). The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after conviction for refusing to submit to induction, petitioner is entitled to resort to habeas corpus to challenge the judgment of conviction on the ground that the convicting court improperly rejected his proffered defense that his selective service classification was invalid.

2. If habeas corpus is an available remedy, whether the inquiry by the habeas corpus court should be limited to the question whether the defense was tendered and rejected by the convicting court or whether the habeas corpus court should also inquire into the jurisdiction of the classifying board.

3. If the latter, whether the habeas corpus court erred in finding that the final classifying board did not exceed its jurisdiction in refusing to classify respondent as a minister of religion.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, pp. 57–65 of the brief for petitioner in *Alexander* v. *United States ex rel. Kulick*, No. 840, which precedes this case on argument.

STATEMENT

On March 11, 1946, Rudolph J. Sunal filed a petition for a writ of habeas corpus in the Dis-

trict Court for the Southern District of West Virginia on behalf of his brother, Theodore Martin Sunal, hereinafter referred to as petitioner, who was in respondent's custody. Briefly, the petition alleged that on March 22, 1945, petitioner was convicted in the District Court for the Western District of Pennsylvania of refusing to submit to induction, in violation of Section 11 of the Selective Training and Service Act, and was sentenced to imprisonment for five years. The petition alleged that this judgment was void (1) because petitioner was illegally denied classification as a duly ordained minister of religion, and the induction order and subsequent judicial proceedings were therefore void, and (2) because the convicting court denied him the opportunity to prove "any substantial defense" to the indictment by excluding evidence which he proffered, which was calculated to show that he was a minister of religion (R. 1–19).

The writ issued (R. 20), respondent filed an answer (R. 23–27), and a hearing was had, at which petitioner's selective service file was introduced. At the hearing, it was stipulated (R. 86–88), *inter alia*, that at the trial of the criminal case petitioner "attempted to offer de novo evidence as to his activity, background and training as a minister and also upon the trial attempted to offer into evidence the entire Draft Board file"; that this evidence was rejected by the convicting court on the theory that the jury could not inquire into the validity of the

selective service classification or into the question whether petitioner was a minister of religion, and the court instructed the jury that these issues were not open for their consideration; and that petitioner did not appeal his conviction.

The pertinent facts relating to petitioner's selective service classification, as revealed by the information in his selective service file, may be summarized as follows:

Petitioner registered under the Selective Training and Service Act with Local Board No. 26, Pittsburgh, Pennsylvania, and on January 15, 1941, he filed his selective service questionnaire (R. 28–33). In answering Series IV (R. 28–29) of the questionnaire[1] concerning his "occupation or activity" he stated that he worked as an "automotive carburetor and electrical mechanic"; that he had performed this work for six years; that his average weekly earnings were $25; that he was employed by the "Bendix-Westinghouse Automotive Air Brake Co."; that he was not engaged in any other business or work; that he was not licensed in any trade or profession; and that there were no other facts concerning his occupation which were pertinent to determining his selective service classification. In Series V, he

[1] In Series III (R. 28), petitioner stated that his education consisted of four years of elementary school and four years of high school.

A letter dated February 2, 1942, from the local board to the Acting Director of Selective Service for Pennsylvania states that petitioner was born November 8, 1916.

stated that during the previous five years he had no occupational experience other than the described job, and in Series VII (R. 29–30), he claimed his parents as dependents. Series VIII (R. 30) relates to "Minister, or Student preparing for the ministry" and provides space for a detailed explanation of any claim to exemption on this ground; petitioner stated, "I am not a minister of religion" and did not fill in any of the remaining spaces in this part of the questionnaire. In Series X (R. 31), petitioner claimed exemption from both combatant and noncombatant military service on the ground that he was a conscientious objector, and he requested classification in Class "IV," which is described in the questionnaire as the classification for those whose induction is deferred by law.

In support of his claim to exemption from military service as a conscientious objector, petitioner filed the special form provided for registrants making such claims. In that document (R. 34–37) he stated, *inter alia,* that "From childhood, through parental guidance have I been taught the necessary steps for true christianity. The Bible used as the source of all training"; that under no circumstances did he believe in aggressive force; that he gave public expression to his views in that "as one of Jehovah's Witnesses I have partaken in door to door testimony service, presenting the gospel message to those who cared to hear * * *"; and that since 1934, his only occupa-

tion, position, job, or type of work, whether compensated or not, was "mechanical". In describing his religious affiliation, petitioner stated that "I have been raised from childhood as one of Jehovah's Witnesses"; that the "church, congregation, or meeting" where he customarily attended was "Kingdom Hall, 907 Middle Street, Pittsburgh"; that the pastor or leader of this religious group was Mr. Joseph Petti; that Jehovah's Witnesses have no creed in respect of participation in war, "sole responsibility being upon individual and his devotion to written law of God"; and that he was a member of the AFL Mechanics Union.

On the basis of this information, the local board on May 10, 1941, classified petitioner I–A (available for military service) (R. 31). On May 15, 1941, petitioner for the first time claimed classification as a minister of religion. He appeared before the board on that date and submitted a letter in which he asserted that he was an "associate minister of of the Allegheny Company of Jehovah's Witnesses" and requested classification in IV–D.[2] The letter was accompanied by documents, including an affidavit of Petti, the leader of the Allegheny Company, to the effect that petitioner had been a regular minister of religion since 1935. The board's minutes (R. 32) reflect

[2] The letter is not reproduced in the printed record, but it is contained in the selective service file which, pursuant to stipulation (R. 120), is before this Court in its original form.

that it considered the new information submitted by petitioner and on June 24, 1941, "declined deferment as a minister because it does not believe the registrant's status comes within the purpose and intent of the Selective Service Act regarding ministers" (see also R. 38).[2]

Thereafter, on July 8, 1941, petitioner had another hearing before the local board. A summary of that hearing, evidently prepared by the board, recites that—

> He added very little to the previous evidence regarding his being a minister of christianity. He stated he has no regular church or institution where he preaches, but goes from house to house in the evening to preach their doctrines. He receives absolutely no salary or renumeration for this, and depends entirely on his secular job to support himself. (R. 39.)

Petitioner appealed from the local board's I-A classification (R. 31), and on July 10, 1941, he wrote another letter (R. 39–40) to the local board, requesting that it be attached to his questionnaire. He stated in this letter that his position as a minister was based upon training by his parents and "correspondence instruction publications of the Watch Tower Bible and Tract Society of New York"; that "I have always when opportune

[2] In respect of petitioner's claim that he was a conscientious objector, the minutes state, "The question is referred to the Appeal Board or Department of Justice" (R. 32).

served as a field publisher, active ministry from door to door"; that "I also serve as assistant to the Treasurer of the Allegheny unit of Jehovah's Witnesses. Also retaining the capacity of Study Conductor for a specified area of the Allegheny company." On December 28, 1941, petitioner addressed a letter (R. 42–44) to the board of appeal explaining that when he filed his questionnaire with the local board in January 1941, he stated in answer to the questions in Series VIII that he was not a minister of religion because he regarded himself, instead, as a "minister of Christianity." The letter further stated that he had been formally ordained, had been a minister of the Allegheny company, and did customarily serve as a minister of Christianity.[4] The board of appeal on January 27, 1942, classified petitioner IV–E, as a conscientious objector (R. 31).[5]

[4] The letter did not explain, however, why petitioner failed to state in his questionnaire that he was a minister of Christianity, either in appropriate spaces provided for a description of his occupation or activities as a basis for classification, or in the space provided at the end of the questionnaire for other facts material to determining his classification.

[5] In doing so the board accepted the recommendation of the Department of Justice hearing officer who had conducted a hearing on petitioner's claim that he was a conscientious objector. At the hearing before the hearing officer, petitioner adduced numerous affidavits from other Jehovah's Witnesses to the effect that he had been affiliated with the sect for a number of years, or that he was a minister, or that his reputation for honesty and integrity was good. The hearing officer's report is included in petitioner's selective service file.

Thereafter, in a letter dated January 31, 1942, to the Director of Selective Service for Pennsylvania,[6] petitioner stated that because of his religious beliefs he would not serve in a "C. O. camp" and that he should be classified as a minister of religion. The State Director examined petitioner's selective service file and declined to interfere with the classification because the facts did not warrant such action.[7]

Petitioner was subsequently ordered to report to his local board for work of national importance, and he refused to do so. On May 19, 1942, he was convicted on account of this violation of the Selective Training and Service Act and sentenced to imprisonment for two years and to pay a fine of $100. He was released from prison on December 6, 1943. (See R. 76.)

Upon his discharge from prison, petitioner renewed his claim to classification as a minister of religion, but he submitted no new evidence at that time. (See R. 45–46.) On May 19, 1944, the local board classified him I–A (R. 32). Peti-

[6] The letter is contained in petitioner's selective service file.

[7] See the State Director's letter of February 26, 1942, containd in the selective service file. National Headquarters of the Selective Service System reached a similar conclusion, pointing out in a letter of April 20, 1942, to the State Director that "this registrant's name is not on the certified list of Jehovah's Witnesses on file in this Headquarters and there is nothing in the correspondence [from petitioner] which would indicate that the registrant has been improperly classified or which would warrant an investigation to determine the circumstances surrounding the registrant's classification."

tioner appeared at the office of the board on May 26, 1944, and requested a hearing before the board (R. 48–49). It appears from a summary, evidently prepared by the board's clerk, that petitioner said at that time that he was working four hours each day as an automobile mechanic and devoted the remainder of his time, approximately 150 hours a month, "to the ministry" (R. 48).

Petitioner was given a hearing before the board on June 9, 1944 (R. 32, 50), at which time he presented a letter[5] stating that "I have publicly symbolized my consecration to do God's will by water immersion in 1935"; that upon his release from imprisonment he was designated a "Pioneer" by the Watch Tower Bible and Tract Society, which meant that he was required to devote 150 hours each month to Jehovah's Witnesses' work; that that work consisted of going from house to house and conducting Bible studies, for which he received no remuneration; that he had been trained for the work by his parents and in Watch Tower Bible schools; that he was "an ardent student of the Watch Tower Magazine"; and that "by reason of being an ordained minister I can perform and preach funeral services, marriage ceremonies, immersion (baptismal) discourses." The letter was accompanied by numerous affidavits of other Jehovah's Witnesses, all to the effect that peti-

[5] The letter of June 9, 1944, to the local board is contained in the selective service file.

tioner was a minister. On June 12, 1944, petitioner submitted another letter and supporting documents, in the same vein as those submitted on June 9 (R. 51–65).*

The local board's minute of June 23, 1944, states that "after Hearing on June 9, 1944 and after due consideration of facts presented Board sees no change in status of registrant than it was when classified by appeal Board on 7/29/41"; petitioner was accordingly classified I–A (R. 32).

On July 1, 1944, petitioner took an appeal and submitted a letter to the board of appeal outlining the respects in which he believed the board erred (R. 67–69). In this letter he stated that he devoted 150 hours a month to Jehovah's Witnesses' activity, 120 hours to his secular job, and his remaining time to assisting his parents operate their farm. On August 31, 1944, the board of appeal, by a vote of 4–0, classified petitioner in I–A (R. 33).

On October 18, 1944, petitioner submitted further information, mostly cumulative, of information already before the local board. The board concluded that it did not warrant reopening the classification (R. 82). Petitioner thereafter urged the state and national directors of Selective Service to intercede on his behalf, but they found

* Petitioner's letter of June 12, 1944, is contained in the selective service file.

no basis for doing so. (See R. 78–79.) He was ordered to report for induction on October 25, 1944, and he reported, but refused to submit to induction, informing the officials at the induction station that he should have been classified as a minister of religion. (See R. 80–81.) His conviction in March 1945 followed. (See p. 3, *supra*.)

The district court below concluded (R. 86) that habeas corpus is an available remedy to inquire into the legality of petitioner's selective service classification; and the court found as a fact (R. 96) that "the record of the petitioner made before his draft boards, filed as part of the evidence in this proceeding, contains evidence upon which the draft boards were justified in placing petitioner in Class I–A, as aforesaid, and denying his claim to the ministerial classification." Accordingly, the writ was discharged (R. 98–99), but petitioner was released from respondent's custody on bail pending appeal (R. 94, 99).

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment was affirmed (R. 118–119). The court held that the exclusion of the profferred defense in the convicting court was an error of law which did not effect the jurisdiction of the court. However, in reliance upon the dictum of this Court in *Estep* v. *United States*, 327 U. S. 114, 123–125, the court held that habeas corpus was an available remedy to probe

the jurisdiction of the selective service boards. Accordingly, the court inquired into the proceedings before the boards and concluded that "the evidence submitted to the District Judge in the habeas corpus proceeding supports his conclusion that there was basis in fact for the denial by the Local and Appeals Boards of Sunal's claim for exemption as a minister of religion" (R. 102–118).

SUMMARY OF ARGUMENT

This case is a companion case to *Alexander* v. *United States ex rel. Kulick,* No. 840, which precedes it on oral argument. The major contentions of the Government are advanced in our brief in the *Kulick* case (pp. 17–45), to which the Court is respectfully referred. The only question in this case requiring independent examination is petitioner's contention, assuming that the issue is open to inquiry by the habeas corpus court, that there is no foundation in fact for the refusal of his board of appeal to classify him as a minister of religion.

The administrative interpretation of the ministerial exemption as applied to the Jehovah's Witnesses sect permits the board to classify a registrant in IV–D if it determines that he stands in the same relationship to members of his sect as a minister stands to his congregation in other religious groups. See State Director Advice No. 213–B, set out at pp. 60–65 in our brief in the *Kulick*

case. This is is to be determined in each individual case based upon—

1. Whether the registrant devotes his life in furtherance of the beliefs of Jehovah's Witnesses; and

2. Whether he performs functions which are performed by regular or duly ordained ministers of other religions; and

3. Whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

Tested by this standard, we think it plain that there is foundation in fact for the refusal of the board of appeal to classify him as a minister of religion. Prior to the war petitioner was employed in a full-time job as a mechanic and even held membership in his craft's union. He was a members of the Jehovah's Witnesses sect, and he participated in their religious activities in his spare time by witnessing from door to door. He informed the board that he was not a minister, and that one Petti was his minister of religion. During the war he undertook to devote five hours daily to Jehovah's Witnesses activities; the remainder of his time was devoted to his secular job as a mechanic and to working on a farm.

These facts do not establish, as is required, that petitioner has devoted his life to the furtherance of the beliefs of the sect. They plainly do not

show that he performs the functions customarily associated with regular or duly ordained ministers of other sects. And they fail to show even that he is regarded by other members of the sect as their religious leader. Indeed, petitioner looks to another member of the sect as his minister of religion. The most that can be said is that petitioner's evidence shows that he is a devout Jehovah's Witness who has no specialized training for the ministry and who witnesses from door to door when he is not engaged in his secular work as a mechanic and farmer. On the basis of such facts it cannot be said, we submit, that the board of appeal closed its eyes to the evidence when it refused to classify petitioner as a minister of religion.

ARGUMENT

IF, AS THE COURT BELOW HELD, THE HABEAS CORPUS COURT HAD JURISDICTION TO INQUIRE INTO THE PROCEEDINGS BEFORE THE SELECTIVE SERVICE BOARDS, THAT COURT CORRECTLY DETERMINED THAT THERE WAS FOUNDATION IN FACT FOR THE REFUSAL OF THE BOARD OF APPEAL TO CLASSIFY PETITIONER AS A MINISTER OF RELIGION

This case presents for consideration the same questions that are involved in *Alexander* v. *United States ex rel. Killick*, No. 840, which precedes the present case on oral argument. In our view, the ruling of the trial court rejecting petitioner's proffered defense of illegal classification was, at worst, an error of law which was correctible on

appeal. It was not an error which affected the jurisdiction of the convicting court or any of petitioner's constitutional rights, consequently the habeas corpus court had no jurisdiction to release petitioner from respondent's custody. The considerations in support of this view are marshalled in our brief in the *Kulick* case, pp. 17–41, and there is thus no occasion to repeat them here.

If, despite the arguments we advance, the dictum of the *Estep* decision, 327 U. S. 114, 123–125, "that *habeas corpus* after conviction is available in these cases" to inquire into the jurisdiction of the local board, is reaffirmed and adopted by this Court, the question which remains is whether the selective service boards exceeded their jurisdiction in refusing to classify petitioner as a minister of religion.

Petitioner does not contend that he was denied any procedural rights in the classification process. His sole claim is that on the evidence before the classifying boards he should have been classified IV-D. To sustain this contention, petitioner bore the burden of establishing that there is no foundation in fact for the refusal of the selective service boards to classify him as a minister of religion. *Estep* v. *United States,* 327 U. S. 114, 122–123. Both courts below held—correctly, we think—that he failed to sustain this burden.

The information which was before the board of appeal when it finally classified petitioner is sum-

marized at pp. 4–12 *supra*. Briefly, it shows that in August 1944, petitioner was a trained mechanic who had worked at that trade since 1934 and was at the time devoting about 120 hours a month to such work, in addition to assisting in the operation of his parents' farm. His education consisted of four years of elementary school and four years of high school. Since 1935, he had been actively affiliated with the Allegheny company of Jehovah's Witnesses. His religious training consisted of instruction from his parents and of reading documents issued by the Watchtower Society. Petitioner's religious leader in the Allegheny unit of Jehovah's Witnesses was one Joseph Petti, who apparently was in charge of the unit. As a member of Jehovah's Witnesses, petitioner's religious activities consisted principally of going from house to house preaching and distributing literature of the sect. He had no church and he received no remuneration for his services. In 1944, he claimed he was devoting approximately 150 hours each month to these activities.

Accepting petitioner's evidence as true, which the classifying board was not required to do "even though no contrary or impeaching testimony was adduced" (*Chin Yow* v. *United States*, 208 U. S. 8, 11–12), we think it fails completely to show that he stands in the same relationship to the Allegheny unit of Jehovah's Witnesses, with which

he is affiliated, as do ministers of other religious faiths to their congregations. Indeed, it affirmatively appears from petitioner's evidence that he regarded one Joseph Petti as his pastor or religious leader. While the evidence shows that petitioner believes in the doctrines and practices of Jehovah's Witnesses and is a willing worker in behalf of the sect, it does not show that he devotes his life to the furtherance of their beliefs. His most active participation in religious work has not at any time averaged more than approximately five hours a day. Prior to his first conviction, it was necessarily considerably less, for he then held a full-time job as a mechanic.

Similarly, there is no evidence that petitioner performs the functions which are customarily performed by regular or duly ordained ministers of other religions. Nor is there any evidence that he is the religious leader of the Allegheny unit of Jehovah's Witnesses, that he leads them in worship, that he, in fact, marries the young or buries the dead, or that he performs any of the functions which are customarily associated with ministers of religion. At best, his evidence shows that he, like other members of the Jehovah's Witnesses sect, practices his religious beliefs by "witnessing" from house to house. It does not show any distinction in function or status between petitioner and the other members of the Allegheny unit. He is not their religious leader and he evidently

possesses no authority over their activities. Like other Jehovah's Witnesses, he devoutly practices his religion, but that is all.

Unless it can be said that all Jehovah's Witnesses are ministers of religion within the meaning of the Selective Training and Service Act and the regulations, petitioner's board of appeal had ample basis for denying him classification as a minister. It seems plain that Congress did not intend, in Section 5 (d), to exempt an entire religious sect from service under the Act. As the Circuit Court of Appeals for the Second Circuit said in *United States ex rel. Trainin* v. *Cain,* 144 F. (2d) 944, 949, certiorari denied, 323 U. S. 795:

> * * * Unlike the exemption for conscientious objectors of § 5 (g) of the Act, which was granted to meet the personal convictions of certain of the registrants, see *United States ex rel. Phillips* v. *Downer,* [135 F. (2d) 521], and which is only from combatant service, the absolute exemption of "regular or duly ordained ministers of religion" contained in § 5 (d) seems more a recognition of the public need for spiritual guidance than a mere individual privilege. Thus, ministers of religion are relieved of the duty of service not so much for their personal religious training and beliefs, but for the disruption of public worship and religious solace to the

people at large which would be caused by their induction. * * * .

If, as the Director of Selective Service has determined (see pp. 41–50 of our brief in the *Kulick* case, No. 840, this Term), and, as we think, only those members of the Jehovah's Witnesses sect who are comparable in status and function to ministers of other religious faiths are entitled to exemption from military service, there can be no question, as the courts below found, that petitioner was properly denied classification as a minister of religion.[10]

CONCLUSION

Petitioner should be remanded to respondent's custody. He has failed to sustain his burden of

[10] Petitioner urges that this case is substantially the same on its facts as *United States* v. *Statler*, 151 F. 2d 633 (C. C. A. 7), where the court concluded that the registrant was improperly denied classification in IV-D. We think that decision open to serious question, since it nowhere appeared from the facts that the registrant stood in the same relationship to other Jehovah's Witnesses as does a minister in other religious sects to his congregation. Significantly, the court disagreed with the petitioner's view that all Jehovah's Witnesses are ministers and are thus exempt from military service (151 F. 2d at 637). The Circuit Court of Appeals for the Seventh Circuit found that the registrant devoted his "full time to ministerial work" and that he therefore should have been classified as a minister. The most favorable evidence for petitioner in this case shows that at the time of his final classification he was a mechanic who, as a member of Jehovah's Witnesses, practiced his religion by witnessing from house to house for a few hours a day, as do other members of the sect.

establishing either that his board of appeal exceeded its jurisdiction or that the convicting court lacked jurisdiction.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

NOS. 535 AND 840.—OCTOBER TERM, 1946.

Theodore Martin Sunal, Petitioner, 535 *v.* David R. Large, Superintendent, Federal Prison Camp, Mill Point, W. Va.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Myrl Alexander, Warden, Petitioner, 840 *v.* United States, ex rel. John Myron Kulick.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 23, 1947.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sunal and Kulick registered under the Selective Training and Service Act of 1940, 54 Stat. 885, 57 Stat. 597, 50 U. S. C. App. § 301, *et seq.* Each is a Jehovah's Witness and each claimed the exemption granted by Congress to regular or duly ordained ministers of religion.[1] § 5 (d). The local boards, after proceedings unnecessary to relate here, denied the claimed exemptions and classified these registrants as I–A. They exhausted their administrative remedies but were unable to effect a change in their classifications. Thereafter they were ordered to report for induction—Sunal on October 25, 1944, Kulick on November 9, 1944. Each reported but refused to submit to induction. Each was thereupon indicted, tried and convicted

[1] Sunal in 1942 was classified as a conscientious objector and ordered to report for work of national importance. On his failure to do so he was convicted under the Act and a fine and term of imprisonment were imposed. The events with which we are now concerned relate to his classification after his discharge from prison.

under § 11 of the Act for refusing to submit to induction. Sunal was sentenced on March 22, 1945, Kulick on May 7, 1945, each to imprisonment for a term of years. Neither appealed.

At the trial each offered evidence to show that his selective service classification was invalid. The trial courts held, however, that such evidence was inadmissible, that the classification was final and not open to attack in the criminal trial. On February 4, 1946, we decided *Estep* v. *United States* and *Smith* v. *United States*, 327 U. S. 114. These cases [2] held on comparable facts that a registrant, who had exhausted his administrative remedies and thus obviated the rule of *Falbo* v. *United States*, 320 U. S. 549, was entitled, when tried under § 11, to defend on the ground that his local board exceeded its jurisdiction in making the classification—for example, that it had no basis in fact. 327 U. S. pp. 122–123.

It is plain, therefore, that the trial courts erred in denying Sunal and Kulick the defense which they tendered. Shortly after the *Estep* and *Smith* cases were decided, petitions for writs of *habeas corpus* were filed on behalf of Sunal and Kulick. In each case it was held that *habeas corpus* was an available remedy. In Sunal's case the Circuit Court of Appeals for the Fourth Circuit held that there was a basis in fact for the classification and affirmed a judgment discharging the writ. 157 F. 2d 165. In Kulick's case the Circuit Court of Appeals for the Second Circuit reversed a District Court holding that there was evidence to support the classification, 66 F. Supp. 183, and ruled, without examining the evidence, that

[2] The *Smith* case was decided by the Circuit Court of Appeals on April 4, 1945, 148 F. 2d 288; the petition for certiorari was filed April 25, 1945, and granted May 28, 1945. 325 U. S. 846. The *Estep* case was decided by the Circuit Court of Appeals on July 6, 1945, 150 F. 2d 768; the petition for certiorari was filed August 3, 1945, and granted October 8, 1945. 326 U. S. 703.

since Kulick had been deprived of the defense he should be discharged from custody without prejudice to further prosecution. 157 F. 2d 811. The cases are here on petitions for writs of certiorari, which we granted because of the importance of the questions presented.

The normal and customary method of correcting errors of the trial is by appeal. Appeals could have been taken in these cases, but they were not. It cannot be said that absence of counsel made the appeals unavailable as a practical matter. See *Johnson* v. *Zerbst*, 304 U. S. 458, 467. Defendants had counsel. Nor was there any other barrier to the perfection of their appeals. Cf. *Cochran* v. *Kansas*, 316 U. S. 255. Moreover, this is not a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal. See *Waley* v. *Johnston*, 316 U. S. 101, 104; *United States ex rel. McCann* v. *Adams*, 320 U. S. 220, 221. And see *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274–275. The error was of record in each case. It is said, however, that the failure to appeal was excusable, since under the decisions as they then stood—March 22, 1945, and May 7, 1945—the lower courts had consistently ruled that the selective service classification could not be attacked in a prosecution under § 11. See *Estep* v. *United States*, *supra*, p. 123, n. 15. It is also pointed out that on April 30, 1945, we had denied certiorari in a case which sought to raise the same point,[4] and that *Estep* v. *United States*, *supra*, and *Smith* v.

[3] We therefore lay to one side cases such as *Bridges* v. *Wixon*, 326 U. S. 135, *Duncan* v. *Kahanamoku*, 327 U. S. 304, and *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, where the order of the agency under which petitioner was detained was not subject to judicial review.

[4] *Rinko* v. *United States*, 325 U. S. 851. We also denied certiorari in *Flakowicz* v. *United States*, 325 U. S. 851; but it, like *Falbo* v. *United States*, *supra*, was one where the administrative remedies had not been exhausted, there being an additional examination which the registrant had not taken. See *Gibson* v. *United States*, 329 U. S. 338.

United States, supra, were brought here [5] and decided after Sunal's and Kulick's time for appeal had passed. The argument is that since the state of the law made the appeals seem futile, it would be unfair to those registrants to conclude them by their failure to appeal.

We put to one side comparable problems respecting the use of *habeas corpus* in the federal courts to challenge convictions obtained in the state courts. See *New York* v. *Eno*, 155 U. S. 89; *Tinsley* v. *Anderson*, 171 U. S. 101, 104–105; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13; *Ex parte Hawk*, 321 U. S. 114, 116–117. So far as convictions obtained in federal courts are concerned, the general rule [illegible] *habeas corpus* will not be allowed to do service for an appeal. *Adams* v. *United States ex rel. McCann*, *supra*, p. 274. There have been, however, some exceptions. That is to say, the writ has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. Illustrative are those instances where the conviction was under a federal statute alleged to be unconstitutional,[6] where there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged,[7] where the trial or sentence by a federal court violated specific constitutional guaranties.[8] It is plain, how-

[5] See note 2, *supra*.

[6] *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127 U. S. 731; *Matter of Heff*, 197 U. S. 488; *Matter of Gregory*, 219 U. S. 210; *Baender* v. *Barnett*, 255 U. S. 224.

[7] *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Bowen* v. *Johnston*, 306 U. S. 19.

[8] *Ex parte Lange*, 18 Wall. 163 (double jeopardy); *In re Snow*, 120 U. S. 274 (same); *In re Nielsen*, 131 U. S. 176 (same); *Counselman* v. *Hitchcock*, 142 U. S. 547 (self-incrimination); *Ex parte Wilson*, 114 U. S. 417 (requirement of indictment); *Ex parte Bain*, 121 U. S. 1 (same); *Callan* v. *Wilson*, 127 U. S. 540 (jury trial); *Johnson* v. *Zerbst*, *supra* (right to counsel); *Walker* v. *Johnston*, 312 U. S. 275 (same); *Waley* v. *Johnston*, *supra*, (coerced plea of guilty).

ever, that the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction,[9] irregularities in the grand jury procedure,[10] departure from a statutory grant of time in which to prepare for trial,[11] and other errors in trial procedure which do not cross the jurisdictional line. Cf. *Craig* v. *Hecht*, 263 U. S. 255.

Yet the latter rule is not an absolute one; and the situations in which *habeas corpus* has done service for an appeal are the exceptions. Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, *habeas corpus* is increasingly denied in case an appellate procedure was available for correction of the error.[12] Yet, on the other hand, where the error was flagrant and there was no other remedy available for its correction, relief by *habeas corpus* has sometimes been granted.[13] As stated by Chief Justice Hughes in *Bowen* v. *Johnston*, 306 U. S. 19, 27, the rule which requires resort to appellate procedure for the

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[9] *Harlan* v. *McGourin*, 218 U. S. 442.

[10] *Ex parte Harding*, 120 U. S. 782; *Kaizo* v. *Henry*, 211 U. S. 146.

[11] *McMicking* v. *Shields*, 238 U. S. 99. The rule is even more strict where *habeas corpus* is sought before trial. See *Johnson* v. *Hoy*, 227 U. S. 245.

[12] *In re Lincoln*, 202 U. S. 178; *Toy Toy* v. *Hopkins*, 212 U. S. 542; *Glasgow* v. *Moyer*, 225 U. S. 420.

[13] *Tinsley* v. *Treat*, 205 U. S. 20 (removal case). In removal cases *habeas corpus* is available not to weigh the evidence to support the accusation but to determine whether there is an entire lack of evidence to support it. *Hyde* v. *Shine*, 199 U. S. 62, 84. It is also available to determine whether removal to the district in question violates a constitutional right of the accused, *Haas* v. *Henkel*, 216 U. S. 462, or whether the court before which it is proposed to take and try the accused has jurisdiction over the offense. *Salinger* v. *Loisel*, 265 U. S. 224. But *habeas corpus* will not be entertained to pass on the question of jurisdiction where it involves consideration of many facts and seriously controverted questions of law. *Rodman* v. *Pothier*, 264 U. S. 399; *Henry* v. *Henkel*, 235 U. S. 219.

correction of errors "is not one defining power but one which relates to the appropriate exercise of power." That rule is, therefore, "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* was apparent." *Id.* p. 27. That case was deemed to involve "exceptional circumstances" by reason of the fact that it indicated "a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions." *Id.* p. 27. The Court accordingly entertained the writ to examine into the jurisdiction of the court to render the judgment of conviction.

The same course was followed in *Ex parte Hudgings*, 249 U. S. 378, where petitioner was adjudged guilty of contempt for committing perjury. The Court did not require the petitioner to pursue any appellate route but issued an original writ and discharged him, holding that perjury without more was not punishable as a contempt. That situation was deemed exceptional in view of "the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected. . . ." *Id.* p. 384. Cf. *Craig* v. *Hecht*, *supra*.

The Circuit Courts of Appeals thought that the facts of the present cases likewise presented exceptional circumstances which justified resort to *habeas corpus* though no appeals were taken. In their view the failure to appeal was excusable, since relief by that route seemed quite futile.

But denial of certiorari by this Court in the earlier case imported no expression of opinion on the merits. *House* v. *Mayo*, 324 U. S. 42, 48, and cases cited. The same chief

counsel represented the defendants in the present cases and those in the *Estep* and *Smith* cases. At the time these defendants were convicted the *Estep* and *Smith* cases were pending before the appellate courts. The petition in the *Smith* case was, indeed, filed here about two weeks before Kulick's conviction and about a month after Sunal's conviction. The same road was open to Sunal and Kulick as the one Smith and Estep took. Why the legal strategy counseled taking appeals in the *Smith* and *Estep* cases and not in these we do not know. Perhaps it was based on the facts of these two cases. For the question of law had not been decided by the Court; and counsel was pressing for a decision here. The case, therefore, is not one where the law was changed after the time for appeal had expired. Cf. *Warring* v. *Colpoys*, 122 F. 2d 642. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized. Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.

We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pur-

sued on appeal. Cf. *Warring* v. *Colpoys*, *supra*. If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.

An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process. As stated by Mr. Justice Cardozo in *Escoe* v. *Zerbst*, 295 U. S. 490, 494, "When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end to the restraint."

It is said that the contrary position was indicated by the following statement in *Estep* v. *United States*, *supra*, pp. 124–125,

> "But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow."

We were there examining the alternative pressed on us—that the classification could not be attacked at the trial. If we denied the defense, we concluded that *habeas corpus* would lie the moment after conviction. For one convicted of violating an illegal order of a selective service board, like one convicted of violating an unconstitutional statute, should be afforded an opportunity at some stage to establish the fact. And where no other opportunity existed, *habeas corpus* would be the appropriate remedy.[14] But that was an additional reason for allowing the defense in the criminal trial, not a statement that defendants prosecuted under § 11 had an alternative of defending at the trial on the basis of an illegal classification or resorting to *habeas corpus* after conviction. These registrants had available a method of obtaining the right to defend their prosecutions under § 11 on that ground. They did not use it. And since we find no exceptional circumstances which excuse their failure, *habeas corpus* may not now be used as a substitute.

Accordingly *Sunal* v. *Large* will be affirmed and *Alexander* v. *Kulick* will be reversed.

So ordered.

MR. JUSTICE BURTON concurs in the result.

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[14] The remedy of *habeas corpus* extends to a case where a person "is in custody in violation of the Constitution or of a law . . . of the United States . . ." R. S. § 753, 28 U. S. C. § 453.

pp. 2. 3. 4

SUPREME COURT OF THE UNITED STATES

Nos. 535 AND 840.—OCTOBER TERM, 1946.

Theodore Martin Sunal, Petitioner, 535 *v.* David R. Large, Superintendent, Federal Prison Camp, Mill Point, W. Va.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Myrl Alexander, Warden, Petitioner, 840 *v.* United States, ex rel. John Myron Kulick.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 23, 1947.]

MR. JUSTICE FRANKFURTER, dissenting.

That *habeas corpus* cannot be made to do service for an appeal is a well-worn formula. But this generalization should not dispose of these two cases, if their actualities are viewed in the light of our decisions.

The First Judiciary Act empowered the courts of the United States to issue writs of *habeas corpus*. Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81. Since the scope of the writ was not defined by Congress, it carried its common law implications. The writ was greatly enlarged after the Civil War by the Act of February 5, 1867. 14 Stat. 385. (For legislation dealing with *habeas corpus* see note in 18 F. 68.) It was no longer limited to searching the face of a judgment of a court of competent jurisdiction. It was available to cut through forms and go "to the very tissue of the structure," Mr. Justice Holmes in *Frank* v. *Mangum*, 237 U. S. 309, 345, 346, though it was certainly not to be invoked merely as

a substitute for an available appeal. But what is "form" and what is the "tissue of the structure," and when is a writ sought in fact as a substitute for an appeal in a practical view of the administration of justice, are questions to which our decisions give dubious and confused answers. I think it is fair to say that the scope of *habeas corpus* in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received.

The extent to which this Court has left itself unhampered, by not drawing sharp jurisdictional lines, is indicated by the following very tentative classification of categories in which *habeas corpus* has not been deemed beyond the power of federal courts to entertain:

(1) Conviction by a federal court which had no jurisdiction either over the person or of the offense. See *Ex parte Watkins*, 3 Peters 193, 203; *Ex parte Parks*, 93 U. S. 18, 23. But the writ is discretionary and may not issue even though if an opportunity were allowed such want of jurisdiction might be established. See *Toy Toy* v. *Hopkins*, 212 U. S. 542, and *Rodman* v. *Pothier*, 264 U. S. 399. And compare *In re Mayfield*, 141 U. S. 107, with *In re Blackbird*, 66 F. 541.

(2) Conviction under unconstitutional statute. *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651. The writ was denied in each case, but the Court passed on the constitutionality of the statute. Here too the availability of the writ will depend on the circumstances of the case, particularly the stage in the criminal proceedings at which the writ is sought. *Johnson* v. *Hoy*, 227 U. S. 245; *Henry* v. *Henkel*, 235 U. S. 219. Compare *Glasgow* v. *Moyer*, 225 U. S. 420 with *Matter of Gregory*, 219 U. S. 210. See also *In re Lincoln*, 202 U. S. 178.

(3) Violation by federal courts of specific constitutional rights: (a) double jeopardy. Compare *Ex parte Bigelow*, 113 U. S. 328, with *In re Snow*, 120 U. S. 274, and *Nielsen, Petitioner*, 131 U. S. 176; (b) self-crimination. Writ granted as to a witness held in contempt, though apparently not as to a defendant restrained on charge of crime. Compare *Counselman* v. *Hitchcock*, 142 U. S. 547, and *Ex parte Irvine*, 74 F. 954 (Taft, Circuit Judge), with *Matter of Moran*, 203 U. S. 96; (c) No indictment by grand jury. *Ex parte Wilson*, 114 U. S. 417. Also *Ex parte Bain*, 121 U. S. 1. As to denial of constitutional rights in State courts, *Moore* v. *Dempsey*, 261 U. S. 86.

(4) Due regard for harmonious Nation-State relations, need to avoid friction and maintain balance. See *Ex parte Rowland*, 104 U. S. 604; *In re Ayers*, 123 U. S. 443; *In re Sawyer*, 124 U. S. 200; *Bowen* v. *Johnston*, 306 U. S. 19. Compare *In re Tyler*, 149 U. S. 164; *In re Swan*, 150 U. S. 637; *Ex parte Young*, 209 U. S. 123. Availability of other remedies is here an important factor. Similarly as to State interference with federal officers, prompt relief may be deemed necessary. *Ohio* v. *Thomas*, 173 U. S. 276. See also *In re Neagle*, 135 U. S. 1; *Hunter* v. *Wood*, 209 U. S. 205.

(5) Insufficiency of indictments is not open on *habeas corpus*. It may be in removal cases, in view of the hardship to the individual and the inadequacy of other remedies. Compare *Tinsley* v. *Treat*, 205 U. S. 20; also *Hyde* v. *Shine*, 199 U. S. 62. Compare also the extradition cases, *Benson* v. *McMahon*, 127 U. S. 457; *Ornelas* v. *Ruiz*, 161 U. S. 502; *Bryant* v. *United States*, 167 U. S. 104.

(6) Defects in jury panel, in trial procedure, exclusion or insufficiency of evidence, are rarely held ground for relief on *habeas corpus*. But when no other remedy was available and the error appeared flagrant, there have been instances of relief. See *Tinsley* v. *Treat*, 205 U. S. 20. Compare *Ex parte Bain*, 121 U. S. 1.

(7) Legality of sentence or conditions of confinement: *Ex parte Lange*, 18 Wall. 163; *In re Bonner*, 151 U. S. 242.

(8) Contempt cases: *Ex parte Hudgings*, 249 U. S. 378, 384. Compare, *Savin, Petitioner*, 131 U. S. 267, and *Cuddy, Petitioner*, 131 U. S. 280. But when appeal was sufficient remedy, see *Craig* v. *Hecht*, 263 U. S. 255, and Judge Learned Hand's dissenting opinion in this case below, 282 F. 138, 155.

Perhaps it is well that a writ the historic purpose of which is to furnish "a swift and imperative remedy in all cases of illegal restraint," see Lord Birkenhead, L. C., *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603, 609, should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. But if we are to leave the law pertaining to *habeas corpus* in the unsystematized condition in which we find it, then I believe it is true of both cases what Judge Learned Hand said of the *Kulick* case, that the writ is necessary "to prevent a complete miscarriage of justice." 157 F. 2d 811, 813. If the justification need be no more definite than the existence of "exceptional circumstances," *Bowen* v. *Johnston*, 306 U. S. 19, 27, the reasons for allowing the writs in these cases are more compelling than were those in *Bowen* v. *Johnston*, where there merely appeared "to be uncertainty and confusion . . . whether offenses within the . . . National Park are triable in the state or federal courts." For the reasons set forth in Judge Hand's opinion, it "would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal." 157 F. 2d at 813.

I agree with both Circuit Courts of Appeals that *habeas corpus* was available as a remedy in the circumstances of these cases, but since the Court does not consider the merits, I shall abstain from doing so.

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[June 23, 1947.]

MR. JUSTICE RUTLEDGE, dissenting.

I am in agreement with MR. JUSTICE FRANKFURTER in the result and substantially in the views he expresses. I would modify them by making definite and certain his tentatively expressed conclusion that the great writ of *habeas corpus* should not be confined by rigidities characterizing ordinary jurisdictional doctrines. And I agree with Judge Learned Hand, in the view stated for the Circuit Court of Appeals in Kulick's case, that upon the sum of our decisions,[1] regardless of the variety of statement in the opinions, no more definite rule is to be drawn out than that "the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional

[1] Including those cited in the Court's opinion and that of MR. JUSTICE FRANKFURTER. See also dissenting opinion, *Ex parte Craig*, 282 F. 138, 155–159, affirmed in *Craig* v. *Hecht*, 263 U. S. 255; The Writ of Habeas Corpus in the Federal Courts (1935) 35 Col. L. Rev. 404.

questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice." 157 F. 2d 811, 813.

In my opinion not only is this the law, measured by the sum of the decisions and the applicable statute,[2] but the aggregate of the results demonstrates it should be the law.

Confusion in the opinions there is, in quantity. But it arises in part from the effort to pin down what by its nature cannot be confined in special, all-inclusive categories, unless the office of the writ is to be diluted or destroyed where that should not happen. And so limitation in assertion gives way to the necessity for achieving the writ's historic purpose when the two collide. Admirable as may be the effort toward system, this last resort for human liberty cannot yield when the choice is between tolerating its wrongful deprivation and maintaining the systematist's art.

The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.[3] This applies to situations

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[2] Rev. Stat. § 761, 28 U. S. C. § 461, which commands the court, after hearing to "dispose of the party as law and justice require." Cf. *Frank* v. *Mangum*, 237 U. S. 309, 330, 331, and dissenting opinion of Mr. Justice Holmes, at 345 ff., concurred in by Mr. Justice Hughes, who afterward as Chief Justice wrote the Court's opinion in *Bowen* v. *Johnston*, 306 U. S. 19. See note 4. Pertinently the statute applies "to prisoners in custody in violation of the Constitution or of a law or treaty of the United States." Rev. Stat. § 754, 28 U. S. C. § 453.

[3] It is for this reason that the doctrine of *res judicata* does not apply to *habeas corpus* determinations, *Waley* v. *Johnston*, 316 U. S.

involving the past existence of a remedy presently foreclosed, as well as to others where no such remedy has ever been afforded.

In the prevailing state of our criminal law, federal and state, there are few errors, either fundamental or of lesser gravity, which cannot be corrected by appeal timely taken, unless the facts disclosing or constituting them arise after the time has expired. If the existence of a remedy by appeal at some stage of the criminal proceedings is to be taken for the criterion, then in very few instances, far less than the number comprehended by our decisions, will the writ be available. Taken literally, the formula so often repeated, that the writ is not a substitute for appeal, is thus in conflict with every case where the ground upon which the writ has been allowed either was or might have been asserted on appeal.[4]

101, 105, although a prior refusal to discharge the prisoner on a like application may be given weight, *Salinger* v. *Loisel*, 265 U. S. 224, 231, for obvious reasons of judicial administration.

[4] In the following cases the Court either passed upon the substance of the contentions presented in the petition for writ of *habeas corpus* or held that the petitioner was entitled to a hearing, although, so far as appears, at the time the petition was filed the time to appeal had expired, *e. g.*, *Bowen* v. *Johnston*, 306 U. S. 19; *Walker* v. *Johnston*, 312 U. S. 375; *Johnson* v. *Zerbst*, 304 U. S. 458, see The Writ of Habeas Corpus in the Federal Courts (1935) 35 Col. L. Rev. 404, 414, n. 66; an appeal had already been taken, *Moore* v. *Dempsey*, 261 U. S. 86; or the time to appeal had not expired, *Hunter* v. *Wood*, 209 U. S. 205; *Ex parte Sawyer*, 124 U. S. 200; *Wo Lee* v. *Hopkins*, 118 U. S. 356, discussed in The Writ of Habeas Corpus in the Federal Courts, *supra*, at 414, n. 60. See also *Appleyard* v. *Massachusetts*, 203 U. S. 222, 225–226; *Ex parte Bridges*, 2 Woods 428, 430, approved in *Ex parte Royall*, 117 U. S. 241.

In his dissenting opinion in *Ex parte Craig*, *supra* note 1, Judge Learned Hand, reviewing the authorities, said: "The appellant's attempt rigidly to classify these exceptions appears to me more definite than the books warrant. A safer rule is to say somewhat vaguely that they must be occasions of pressing necessity." 282 F. at 156.

The formula has obvious validity in the sense that the writ is not readily to be used for overturning determinations made on appeal or for securing review where no specification has been made or no appeal has been taken of matters not going to make the conviction a gross miscarriage of justice.

But any effort to shut off the writ's functioning merely because appeal has not been taken in a situation where, but for that fact alone, the writ would issue, seems to me to prescribe a system of forfeitures in the last area where such a system should prevail. Certainly a basic miscarriage of justice is no less great or harmful, either to the individual or to the general cause of personal liberty, merely because appeal has not been taken, than where appeal is taken but relief is wrongfully denied.

These considerations apply with special force, though not exclusively, where good reason existed, as I think did here, for failure to note the appeal in the brief time allowed.[5] Whether or not the inferior federal courts were

[5] The opinion of the Circuit Court of Appeals in the *Kulick* case, after stating the summarized effect of our decisions as quoted in the text above, said concerning this case: "The occasion at bar is such; certainly the reasons for allowing it are more compelling than were those in Bowen v. Johnston [see notes 3, 4, *supra*], where there merely appeared 'to be uncertainty and confusion . . . whether offenses within' a national park 'are triable in the state or federal courts.' It would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal. Not only had there not been any glimmer of a positive chance of success, but there had been an unusual consensus of judicial opinion against it in the lower courts. Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies; in a number of others they had done so; and no distinction had been established between the two. Indeed, in United States v. Flakowicz, supra [146 F. 2d 874], which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12th," the date of Kulick's conviction. 157 F. 2d at 813–814. See note 9 *infra*.

justified in taking the *Falbo* decision [6] for more than its specific ruling, the fact remains that their broadly prevailing view was that that case had cut off all right to make such defenses as Sunal and Kulick tendered.[7]

In that prevailing climate of opinion in those courts, there was hardly any chance that appeal to the federal circuit courts of appeals would bring relief by their action.[8] The chances for reversal therefore hung almost exclusively upon the doubtful, not to say slender,[9] chance that this Court in the exercise of its discretionary power would grant certiorari.

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[6] *Falbo* v. *United States*, 320 U. S. 549. The opinion, though containing language emphasizing the failure of Congress to provide expressly for judicial review of selective service boards' classifications, explicitly pointed out that "a board order to report is *no more than a necessary intermediate step* in a united and continuous process designed to raise an army speedily and efficiently" and that, if there were a constitutional requirement for judicial review, "Congress was not required to provide for judicial intervention *before final acceptance* of an individual for national service." Pp. 553, 554. The opinion also stated: "Surely if Congress had intended to authorize interference with that process *by intermediate challenges of orders to report*, it would have said so." P. 554. (Emphasis added.)

[7] See note 5 *supra*, and the cases cited in MR. JUSTICE FRANKFURTER's opinion in *Estep* v. *United States*, 327 U. S. 114, 139.

[8] In reference to Kulick's case the chance was practically nil, since the Circuit Court of Appeals for the Second Circuit previously had ruled the question adversely to the validity of the defenses in *United States* v. *Flakowicz*, 146 F. 2d 874, and certiorari had been denied here. 325 U. S. 851. See note 5.

United States v. *Smith*, 148 F. 2d 288, afterwards reversed here, 327 U. S. 114, apparently was the first in which the Circuit Court of Appeals for the Fourth Circuit decided the question. The decision was rendered April 4, 1945. Sunal was convicted on March 22, 1945.

[9] Although denial of certiorari is not to be taken as expression of opinion in any case, it would be idle to claim that it has no actual or reasonable influence upon the practical judgment of lawyers whether appeal should be noted and taken upon the chance that in a case substantially identical this Court's discretion would be exercised, in the absence of conflict, in a contrary manner at the stage of application for certiorari.

The deprivation here was of the right to make any substantial defense.[10] I do not think a trial which forecloses the basic right to defend, upon the only valid ground available for that purpose, is any less unfair or conclusive as against the office of *habeas corpus* than one which takes place when the court is without jurisdiction to try the offense, as when the charge is made under an unconstitutional statute or for other reason sets forth no lawfully prescribed offense, or when the court loses jurisdiction by depriving the accused of his constitutional right to counsel. That right is no more and no less than an important segment of the right to have any valid defense advanced and considered. It becomes almost meaningless if the larger right to defend is itself cut off.[11]

With MR. JUSTICE FRANKFURTER, since the Court reaches only the question of the availability of *habeas corpus*, I do not consider others.

MR. JUSTICE MURPHY joins in this dissent. He believes that today's decision unduly narrows the point at which due process may be accorded those accused or convicted of violating the Selective Training and Service Act of 1940. Cf. his dissenting opinion in *Falbo* v. *United States*, 320 U. S. 549, 555, and his concurring opinion in *Estep* v. *United States*, 327 U. S. 114, 125.

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[10] Under the rule applied in the district courts and the circuit courts of appeals the only defenses open would have been that the defendants had not refused to take the oaths. No defense relating to the validity of the statute, the regulations, or their application in the particular cases was available.

[11] Cf. *Yakus* v. *United States*, 321 U. S. 414, dissenting opinion, at 460 ff.